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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

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FILE: B-190770

DATE: March 8, 1978

MATTER OF: Darrell N. Kirby

- DIGEST:**
1. Payments made to members of the uniformed services, such as casual, partial, or advance payments which are valid when made, are not considered to be erroneous payments and may not be considered for waiver under 10 U.S.C. 2774. However, to the extent that such payments should be set off against a member's final pay and are erroneously not set off, that amount of final pay received may be considered for waiver under 10 U.S.C. 2774.
 2. Where a member transferred from Southeast Asia to a hospital in the United States receives casual payments which are not processed in a timely fashion prior to his discharge, thereby creating a debt to the United States, final pay to the extent that it should have been set off, is considered an erroneous payment and is waived under the provisions of 10 U.S.C. 2774.
 3. Payment made to a member as the result of administrative error in not adjusting his leave account is an erroneous payment, and where there appears to be no fault on the part of the member, waiver is granted under 10 U.S.C. 2774.

This action is the result of an appeal from the determination of our Claims Division denying Darrell N. Kirby's request for waiver under 10 U.S.C. 2774 (Supp. I, 1972), of excess payments received incident to a tour of duty in the United States Air Force. Mr. Kirby is indebted to the United States in the amount of \$873.92.

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Mr. Kirby received 4 casual payments in the 3 months prior to his discharge on March 8, 1974. These payments were \$170 on January 23, 1974; \$204 on February 4, 1974; \$204 on February 19, 1974; and \$204 on March 1, 1974. Apparently, these casual payments were made while Mr. Kirby was hospitalized following his return to the United States from Southeast Asia. Just prior to his discharge he went on leave for the period March 1-6, 1974.

During the month of December 1973, his net pay and allowance entitlements were \$412.98, which he received in payments of \$205.67 and \$207.31. In January 1974 his net entitlement was \$278.53. He was not paid this amount in January and it was carried forward to his February entitlements. In February his total net entitlements, including the amount carried forward from January totaled \$797.37, which he was actually paid in February in two payments of \$566.15 and \$231.22. For the period in March that he was on active duty, he was paid a total of \$339.10. This amount was paid in a payment in March of \$268 and a payment of \$71.10 in April. A portion of the \$339.10 represented unused leave.

Subsequent to Mr. Kirby's separation from active duty, an audit of his pay account was conducted, which revealed that deductions from his entitlements had not been made for the casual payments he had received during the period January through March 1974. These payments totaled \$782. An audit of his leave record showed that he had received a lump-sum leave payment, which included 6 days of leave (March 1 through 6, 1974) that he had actually used thereby creating an additional debt of \$1.92.

The records show that a request for repayment of the amount of \$873.92 was made to Mr. Kirby in May of 1975.

Section 2774(a) of title 10, United States Code, provides the authority for waiver, under certain circumstances, of claims by the United States against a member or former member of the uniformed services, arising out of "erroneous" payments of pay and allowances, other than travel and transportation allowances. However, payments which are considered valid when made are not considered to be erroneous payments for the purposes of waiver under 10 U.S.C. 2774, even though due to later occurring

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circumstances, an individual may be indebted for all or part of such payment. B-152040, B-152422, December 5, 1972, and B-186022, March 2, 1977

In this regard, casual, partial, or advance payments are generally considered valid payments when made. The fact that these payments are not set off against future payments, thereby creating an indebtedness, does not change the character of these payments to erroneous. However, when the member receives his final pay at discharge, the final pay he receives is considered an erroneous payment to the extent that it should have been set off.

Thus, the facts in this case are that Mr. Kirby's debt was primarily the result of a failure on the part of the Air Force to recoup casual payments made to him prior to his discharge and a failure to adjust his leave account. The amount of \$91.92 he received representing accrued leave to which he was not entitled is clearly an erroneous payment and may be considered for waiver under 10 U.S.C. 2774. The debt resulting from the failure to recoup the casual payments may only be considered under 10 U.S.C. 2774 to the extent that his final pay should have been set off against it. Thus, only the total amount of \$339.10 (\$91.92 leave payment and \$247.18 final pay) may be considered for waiver.

Subsection 2774(a) of title 10, United States Code, authorizes the waiver of a claim of the United States against a person arising out of an erroneous payment of pay and allowances, the collection of which would be against equity and good conscience and not in the best interests of the United States. However, subsection 2774(b) provides that the waiver authority of the Comptroller General or the Secretary concerned may not be exercised, if in his opinion, there exists in connection with the claim, any indication of fraud, misrepresentation, fault, or lack of good faith on the part of the member or any other person having an interest in obtaining a waiver of the claim.

Ordinarily, a member who receives payments, which he knows will have to be repaid, would be considered, at least partially at fault, when repayment is not made, nor is it requested prior to his discharge. However, in Mr. Kirby's case it appears that on his return from Southeast Asia he was hospitalized and his pay records were not transferred with him to the hospital. As

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a result, it appears that he requested casual payments during the period just prior to his discharge. This is supported by the fact that his net entitlements during January were not paid to him on regular paydays, but were carried forward in his pay account and paid to him in February. While these payments should have been deducted from his future entitlements, they were not processed by Air Force personnel in time to be set off against his entitlements. In fact at least one of the casual payments was not processed until July 1974. Furthermore, Mr. Kirby was not advised of his indebtedness until May 1975.

Therefore, under the unusual circumstances of this case, we hereby waive that portion of Mr. Kirby's debt, \$339.10, which may be considered under the provisions of 10 U.S.C. 2774. Thus, Mr. Kirby's debt is reduced to \$534.82. This amount should be repaid to our Claims Division or Mr. Kirby should submit a payment plan in accordance with earlier correspondence.

We are also forwarding copies of the casual payment receipts and a summary of his pay record for the period involved.

R. J. K. 114
Deputy Comptroller General
of the United States